Supreme Court, U. S.
FILED
DEC 4 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-860

ROBERTS, JOHN E.,
Petitioner

versus

UPPER MILFORD TOWNSHIP; UNSER, THOMAS H., SUPERVISOR; CHRISTMAN, PAUL D. SUPERVISOR; LICHTENWALNER, WALTER, H., SUPERVISOR; COOPER, PAUL F. SECRETARY; WORTH, WALLACE, SOLICITOR; RAMER, GAYL P., OFFICE SECRETARY; SCHOONHOVEN, WILLEM S., ZONING OFFICER SCHOONHOVEN, WILLIAM S. (Amended Complaint)
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, John E. Roberts, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit

OPINIONS BELOW

The judgment and order of the United

States Court of Appeals, Third Circuit, rendered September 6, 1979, is unsupported and appears at Appendix "A", infra, Page 11. Judgment and Order of the United States District Court, Eastern District of Pennsylvania, rendered April 21, 1978, it appears at Appendix "B", infra, Page 15.

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, was rendered on September 6, 1979, and the Petition for Writ of Certiorari is timely filed within ninety (90) days hereof. The jurisdiction of this Court rests upon 28 U.S.C. Section 1343 and 42 U.S.C. Section 1981, 1982, 1983 and 1985, and the constitution of the United States more particularly the fourth and fourteenth amendments of the Constitution.

QUESTIONS PRESENTED

The question presented for consideration in the instant is whether or not the motion for summary judgment should have been granted by the Court in view of the fact that: (a) The Defendants filed no Affidavit in support of their position, and (b) the only factual information before the Court consisted of the pleadings and the deposition of the Petioner.

STATEMENT OF THE CASE

John E. Roberts, the herein named Petitioner, without the benefit of counsel, filed a complaint against the above named Defendants. The complaint was amended by order of the District Court. The Amended Complaint, filed by the counsel on behalf of the Petitioner, requested inter alia, an injunction enjoining the enforcement of a 1973 Township Zoning Ordinance which

the Petitioner maintains was improperly enacted by the Defendant township in violation of the constitutional rights of the Petitioner. An answer was duly filed to the Amended Complaint. The deposition of the Petitioner was taken. The District Court granted the Defendant motion for a summary judgment. That decision was affirmed by the Court of Appeals.

ARGUMENT

The Amended Complaint avers that the adoption of the subject Zoning Ordinance violated the Petitioner's constitutional rights in that the Ordinance so adopted was both arbitrary and unreasonable and bore no reasonable relationship to the public's health, safety, and welfare. The Amended Complaint also indicated that the Ordinance was improperly adopted. Finally, the Amended Complaint also avers a continued

course of conduct of harassment by the Defendants against the Petitioner.

The depositions are a matter of public record. While counsel for Defendants went into great detail exploring the harassment issues as raised in the Amended Complaint, no testimony was elicited from the Petioner relative to the issue of the constitutionality of the Ordinance. The depositions speak for themselves. It is submitted, however, that after review of the depositions and the pleadings, it is clear that the summary judgment should not have been granted. If the case were permitted to go to trial, the Petitioner was and is ready, willing, and able to present competent and valid expert testimony that the Zoning Ordinance as adopted was unconstitutional. Testimony would be introduced to reveal the fact that the Petitioners'

property which had been zoned commercial was unconstitutionally zoned residential. The testimony would indicate that the Petitioners' property is located along the most heavily traveled highway within the township and that the only reasonable zoning for the property was and is commercial and not residential. Testimony will also be introduced to show that other areas within the township which are clearly residential nature were rezoned commercial be virtue of the 1973 Zoning Ordinance. Finally, testimony will be introduced at the time of trial, and some of that testimony does in fact appear in the depositions, that at the time of the adoption of the 1973 Zoning Ordinance, the Petitioner was totally incapacitated. He had no knowledge of the intended change of the Zoning Ordinance and was unable to read

the legal notice as it appeared one (1) time in the local newspaper by virtue of his physical incapacity. Testimony would be introduced at the time of trial indicating that there was in fact, therefore, a taking of the Petitioner's property without due process of law.

The law is quite clear concerning the position taken by Courts on the issue as to whether or not a summary judgment should be granted.

In considering a motion for summary judgment, the pleadings are to be liberally construed in favor of the party in opposition to the motion. The benefit of all reasonable inferences that may be drawn from the evidence must be given to the party opposing the summary judgment. In Evers v. Buxbaum, 253 F. 2d 356 (1958), the U. S. Court of Appeals for the District

of Columbia in holding that there were issues which prevented the entry of a summary judgment stated that:

> "This was not a case for summary judgment, which, the Supreme Court has pointed out, is authorized "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their rights of trial by jury if they really have issues to try."
>
> "The appellees, as moving parties, had the burden under a strict standard of showing the absence of any genuine issue as to all material facts; indeed all inferences of fact from the proofs available must be drawn against the movants and in favor of the appellant here. Moreover, the movants must establish that they are entitled to their judgments as a matter of law." (At page 357)

Given the clear mandate of the Evers case, it is respectfully submitted that

the Defendants have not met the strict standard imposed upon them of showing the absence of any genuine issue as to all material facts.

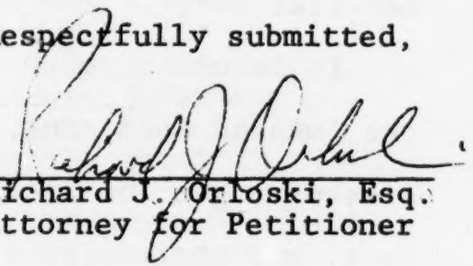
It is clear, that a portion, or all of the Amended Complaint, does in fact present a genuine issue as to a material fact, and therefore, the summary judgment should not have been granted.

The Petitioner has the right to prove through Court proceedings by expert testimony, that the Zoning Ordinance was in fact unconstitutional. He has been deprived of this right by the granting of the summary judgment by the Court below.

For the reasons as hereinabove stated, it is submitted that the summary judgment should not have been granted, and that the

Petitioner should be permitted his day in Court to prove the validity of his Amended Complaint.

Respectfully submitted,



Richard J. Orloski, Esq.
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1852 and 78-1853

Roberts, John E.,

Appellant, No. 78-1853

versus

Upper Milford Township; Unser, Thomas H., Supervisor; Christman, Paul D., Supervisor; Lichtenwalner, Walter H., Supervisor; Cooper, Paul F., secretary; Worth, Wallace, Solicitor; Ramer, Gayl P., Office Secretary; Schoonhoven, Willem S., Zoning Officer Schoonhoven, William S. (Amended Complaint)

Roberts, John E.,

Appellant, No. 78-1853

versus

Upper Milford Township; Unser, Thomas H., Supervisor; Christman, Paul D., Supervisor; Lichtenw alner, Walter H., Supervisor; Cooper, Paul F., Secretary; Worth, Wallace, Solicitor; Ramer, Gayl P., Office Secretary; Schoonhoven, Willem S., Zoning Officer Schoonhoven, William S. (Amended Complaint)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 76-3161)

Submitted Under Third Circuit Rule 12(6)
September 6, 1979
Before: ALDISERT, ROSENN and GARTH,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 76-3161

JOHN E. ROBERTS,
Plaintiff

versus

UPPER MILFORD TOWNSHIP, THOMAS H. UNSER, PAUL D. CHRISTMAN, WALTER H. LICHTENWALNER, Supervisors; PAUL F. COOPER, Secretary; WALLACE WORTH, Solicitor; GAYL P. RAMER, Office Secretary; WILLEM S. SCHOONHOVER, Zoning Officer,

Defendants

Appeals from the United States District Court for the Eastern District of Pennsylvania

O R D E R

JOHN B. HANNUM, J.

Now, this day of , 1978, after careful consideration of Defendants' Motion for Summary Judgment and

the Plaintiff's opposition thereto, and after review of the Report and Recommendation of the United States Magistrate, it is ORDERED that:

1. The Report and Recommendation is Approved and Adopted.

2. The Defendants' Motion for Summary Judgment is Granted.

JOHN B. HANNUM, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 76-3161

JOHN E. ROBERTS,
Plaintiff

versus

UPPER MILFORD TOWNSHIP, THOMAS H. UNSER, PAUL D. CHRISTMAN, WALTER H. LICHTENWALNER, Supervisors; PAUL F. COOPER, Secretary; WALLACE WORTH, Solicitor; GAYL P. RAMER, Office Secretary; WILLEM S. SCHOONHOVER, Zoning Officer,
Defendants

Appeals fromthe United States District Court for the Eastern District of Pennsylvania

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

APRIL 11, 1978

Plaintiff, John E. Roberts, filed on October 12, 1976 a lengthy complaint seeking, inter alia, to enjoin enforcement of the Upper Milford Township Zoning Ordinance. In response to various motions made by the defendants pursuant to Federal Rule of Civil Procedure 12(b) (6)[1] on March 3, 1977, plaintiff filed an amended complaint under the Civil Rights Act of 1866, 42 U.S.C. §1981, 1986, 1983, and 1985.

Defendants filed an answer which was followed by the plaintiff's motion for a preliminary injunction. On May 26, 1977 the defendants deposed the plaintiff. They now move for summary judgment.

BACKGROUND FACTS

Plaintiff, a resident of Upper Milford Township, owned real property there

1 The amended complaint has been brought pursuant to the Civil Rights Act 42 U.S.C. §1981, 1982, 1983, and 1985 with jurisdiction founded upon 28 U.S.C. §1343.

which, in 1973, under a comprehensive zoning ordinance enacted pursuant to the Pennsylvania Municipal Planning Code, was rezoned from commercial to residential. In accordance with the Code's requirements, notice of the plan was published in a local newspaper. In addition, the Code provided individuals with several alternatives to challenge the zoning ordinance including: access to the courts to remedy procedural defects or attach its validity on substantive grounds and administrative remedies such as a hearing in front of the zoning board, the right to apply for a curative amendment, and the right to seek a special exception or variance.

The plaintiff before us has chosen not to exercise his rights as listed above. Instead, he brought this action in Federal Court alleging that the zoning ordinance

was unconstitutional because he said it, "was both arbitrary and unreasonable and bore no reasonable relationship to the public health, safety, and welfare". Plaintiff further maintains that the ordinance enacted was not in accordance with the enabling legislation and that the notice given failed to satisfy the requirement of due process. Finally, plaintiff alleges that the defendants have conducted an ongoing practice of harassment against him involving false arrests, the denial of access to public records, and threats on his life.

DISCUSSION

Under the Federal Rules of Civil Procedure, either a claimant or defending party will be granted a summary judgment if, in accordance with the requirements of Rule 56, that party can show that there

exists no genuine issue as to any material fact.

> "Rule 56 provides the means by which a party may pierce the obligations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact questions that need to be tried". 10 Wright and Miller, Federal Practice and Procedure, SS 2712 at 371.

In the present case, the defendants contend in their brief filed in support of this motion for summary judgment that neither the complaint nor the deposition of plaintiff states any genuine question of material fact and that both contain only "confusing, conclusory, and unsupported allegations".

Nowhere in his complaint, his deposition, or in his brief filed in opposition to defendants motion for summary judgment has the plaintiff provided the court with any facts showing, or from which it

can be inferred, that the defendants deprive him of constitutional rights.

In paragraph 11 of his complaint, plaintiff alleges that his land "was affected by the change in zoning". He does not, however, allege that his land alone was affected or that he was deprived of all reasonable uses of the land. See C.F. Lytte vs. Clark, 491 F. 2d 834, 838 (10th Cir. 1974). The mere fact that the plaintiff may have been deprived of the most profitable use of his land does not establish that he was denied due process. 6th Camden Corporation vs. Evesham Township, Burlington County, 420 F.S. 709 (D.C. D. N.J. 1976), M.S. vs. Central Eureka Mining Company, 357 U.S. 155, 168, 78 S. Ct. 1097, 2 L. Ed. 122k (1958).

During depositions, when asked whether he was claiming "spot zoning" the

plaintiff answered in the affirmative. But in the very next question plaintiff was asked:

> "...You're saying that the zoning ordinance has excluded you and made your property different from all the rest"?

Plaintiff replied:

> "...No Sir".

Thus plaintiff has never really alleged that the ordinance discriminates against him personally. Moreover, to attach its constitutionality, the plaintiff must specifically allege that there exists no rational relationship between the ordinance and the promotion of police power. Stone vs. City of Maitland, 446 F. 2d, 83, 87 (5th Cir. 1971).

Paragraph 12 of the complaint contains plaintiff's allegation that the ordinance was arbitrary and unreasonable and bore no reasonable relationship to

the public welfare. It does not, however, specify and facts on which the allegation is grounded. Plaintiff has not contested defendants' statements that the ordinance was adopted pursuant to a comprehensive plan. In both his complaint and brief in opposition to defendants' motion for summary judgment, plaintiff's only allegation which even hints at why he believes the ordinance is unreasonable states:

> "The area rezoned residential abuts the most heavily traveled roadway (Route 29) in the country".

This statement is insufficient in meeting the plaintiff's duty to plead with specificity. The volume of traffic is obviously only one of many factors that must be considered in formulating a zoning plan. Moreover, this court will not concern itself with the wisdom, intelligence or rationale underlying such laws, only their

reasonableness. As the court in 6th Camden Corporation vs. Evesham Township, supra, aptly stated:

> "The scope of this review is extremely narrow. A Federal Court does not sit as a "superzoning board" to review the correctness of a zoning decision or even its legality under state law.
> ...a zoning commission is a quasilegislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity." 420 F. Supp. at 726; accord, South Gioinnet Venture vs. Pruitt, 491 F. 2d 7 (5th Cir. 1974).

Plaintiff's allegations to the effect that the enactment of the ordinance was unconstitutional on procedural grounds are equally deficient. Even if construed in the light most favorable to plaintiff, his allegation that he was not provided with sufficient notice before the rezoning was effected does not allege a denial of due

process. Plaintiff's statement that his property was "affected by the changed zoning" is not conclusive that there was a public taking. However, even assuming plaintiff was deprived of property rights, it was not accomplished without offering him notice and opportunity to defend. The Municipal Planning under which the ordinance was enacted provides for numerous judicial and administrative remedies of which the Plaintiff has not availed himself. Plaintiff's allegation that he did not receive actual notice until after the ordinance was enacted is of no consequence because the statute requires only constructive notice. Furthermore, due process does not require that a hearing be provided before the enactment of an ordinance affecting property rights where the property owner is afforded access to the courts to challenge the

legality of the law or to present a defense. See, Sager vs. Burgess, 350 F. Supp. 1310, 1313 (D.C. E.D. Pa. 1972) affirmed, 411 U.S. 941, (1973). In addition to the above, plaintiff alleges that he was harassed by defendants who, he says, denied him the right to view and copy public documents, had him falsely arrested and made threats on his life. These charges, like the others, pose no genuine issue as to any material fact.

Plaintiff's deposition makes clear that he has been given access to most, if not all, of the numerous public records he has requested. As to the charge of false arrest, it is stated in defendants' brief that although plaintiff was acquitted on a charge of criminal harassment arising from his picture-taking activities at defendants' roadwork

operations, he was at the same trial, convicted on a charge of harassment at town meetings. Plaintiff makes no attempt to refute these statements and nowhere does he set forth facts or circumstances to substantiate his charge of false arrest. Finally, the deposition fails to support plaintiff's charge that the defendants, either alone or in concert, made threats on his life. This last charge also poses no questions of fact substantial enough to withstand defendants' motion for summary judgment.

Plaintiff "cannot rest on the allegations contained in his [amended] complaint in opposition to a properly supported summary judgment motion made against him". First National Bank vs. Cities Seurdo, 391 U.S. 253 at 289 (1968). His cliam founders hopelessly on the most elementary

and fundamental shoal of summary judgment law -- he has failed to establish the existence of a single, genuine issue of material fact (as opposed to legal arguments of which he has advanced many) justifying a trial, and the unsupported facts of record require judgment for the defendant on the Civil Right Claim.

Plaintiff did not file any affidavits, nor did he provide us with any references to parts of the deposition, where evidence might be found to indicate the genuineness if any of the asserted issues of fact. He urges us to wait for trial, where testimony can be produced. As we have seen, this position cannot sustain him.

Accordingly, the following recommendation is entered:

R E C O M M E N D A T I O N

Now, this day of

1978, it is respectfully recommended that defendants' motion for summary judgment be GRANTED.

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE